Supreme Court, U.S.
FILED
FEB 9 1980
MICHAEL RODAK, JR., CLERK

No. 79-962

In the Supreme Court of the United States

OCTOBER TERM, 1979

TENNESSEE GAS PIPELINE COMPANY, ETC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-72a) is reported at 606 F. 2d 1094. The orders of the Federal Energy Regulatory Commission (then the Federal Power Commission) (Pet. App. 73a-158a, 159a-205a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1979, and rehearing was denied on October 31, 1979 (Pet. App. 207a-208a, 209a-210a). The petition for a writ of certiorari was filed on December 19, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether Commission Order No. 465, permitting a natural gas pipeline to include in its rate base "reasonable and appropriate" advance payments, authorizes the Commission to impose a requirement that the payments be expended by the recipient within a reasonable period of time.

STATUTES AND REGULATION INVOLVED

Sections 4(a) and (e) of the Natural Gas Act, 15 U.S.C. 717c(a) and (e), are set forth at 79-1055 Pet. App. 73a-74a.

Commission Order No. 465, 48 F.P.C. 1550 (1972), rehearing denied, 49 F.P.C. 517 (1973), is set forth at Pet. App. 211a-231a.

STATEMENT

The history of the advance payments program and the proceedings below in this case are set forth in our petition for certiorari in No. 79-1055, *Federal Energy Regulatory Commission* v. *United Gas Pipeline Co.* (79-1055 Pet. 3-9). In brief, an experimental Commission program, terminated in 1975, permitted interstate pipeline companies to include in their rate base certain "reasonable and appropriate" advances made to natural gas producers pursuant to contracts. The dispute in this case and in *United Gas Pipeline Co.* involves Commission Order No. 465, governing advance payment contracts executed in 1973, and the Commission's conclusion under that Order that front-end advance payments not expended by the producer within 30 days after the close of the rate period were presumptively extravagant, and thus could not be included in the pipeline's rate base absent a specific showing that the

premature payment was in fact reasonable. On judicial review, the Fifth Circuit in *United Gas Pipeline Co.* found that the 30-day requirement imposed a new standard on the pipelines, and reversed the Commission's Order excluding the payments from the rate base (79-1055 Pet. App. 1a-22a). In contrast, the court below determined that the Commission acted within its discretion in finding a reasonable time requirement comprehended within the requirement in Order 465 that the advances eligible for inclusion in the rate base must be "reasonable and appropriate." It also held, however, that the 30-day presumption was "unduly restrictive in that it failed to take account of all factors relevant to the 'reasonable timing' inquiry" (Pet. App. 48a), and remanded the case to the Commission "for a more extensive and flexible inquiry * * * into the reasonableness" of the particular advance payments involved (*id.* at 51a). That inquiry has not yet been conducted.

ARGUMENT

As we noted in our petition in *United Gas Pipeline Co.*, we do not believe that the conflict between the court below and the Fifth Circuit over the proper interpretation of Commission Order 465 merits resolution by this Court.[1]

1. The extent of the practical effect of the conflict is not yet clear. The question of the eligibility of the advance payments petitioner made under Order 465 has been remanded to the Commission, with directions that the Commission must consider its own responsibility for

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[1]We petitioned in *United Gas Pipeline Co.* in order to present both cases to this Court in case it concludes, contrary to our submission, that the issue warrants review.

the ambiguity in the Order and its effect on the industry (Pet. App. 54a-55a n.97), as well as the pipeline's arguments that the payments in fact benefited the consumers (Pet. App. 51a-56a, 63a-72a). Accordingly, petitioner's contentions concerning the economic advantages of the advance payments to consumers (Pet. 8-9, 22-23) and its reliance on prior Commission interpretations (Pet. 14-20) should be presented to the Commission in the reconvened proceeding in the first instance.[2] To the extent that the Commission finds them meritorious, the advance payments at issue here, like those in *United Gas Pipeline Co.*, will be included in the rate base, and the differing rationales of the two decisions will have little practical effect.[3] If the Commission finally rejects petitioner's claims in this regard, petitioner can test that rejection in the court of

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[2]It is not clear that petitioner reasonably concluded that Order 465 abandoned any timeliness requirement. The advance payments program was a specific, experimental departure from the established principle that the rates charged consumers reflect only expenditures made for their benefit—expenditures "used and useful" in providing services to current rate payers. Nothing in the Commission's advance payment orders signalled an intention to abandon this traditional regulatory principle, or to create a broader exception than the one specifically provided to permit advance payments "reasonable and appropriate" to achieve the precise aims of the program, *i.e.*, to make funds available for immediate exploration and development efforts (Pet. App. 27a-40a). Any assumption by petitioner that Order 465 would permit inclusion in the rate base of any front-end payment it offered in order to compete with other pipelines in obtaining gas allocations was probably unjustified in light of the established regulatory principle (*ibid.*; see also Pet. App. 42a-43a).

[3]Because the periods between the time various payments were made and the time they were expended varied considerably, the Commission might well find some, but not others, were reasonable.

appeals and, if necessary, by a petition in this Court. At that point this Court would have the benefit of a complete record and full consideration of the claims by the Commission and the court of appeals.

2. Even assuming the question is ripe for review, we do not believe it is of sufficient continuing significance to merit this Court's consideration. The meaning of the disputed provision of Order 465 affects only the rate base treatment of advance payments under contracts made in 1973 under a terminated program.[4] Although those advances were substantial, the decision below will have no significant long term effect.[5] Any difference in treatment of the pipelines or the consumers involved resulting from the disparate results of the decision below and that of the Fifth Circuit in *United Gas Pipeline Co.* will diminish over time.[6] The issue thus has neither a

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[4]Commission Order No. 499, governing advance payment agreements made in 1974 and 1975, contains slightly different language (79-1055 Pet. 4, 7 n.8, 10 n.9). The Fifth and D.C. Circuits agree that this language permits the Commission to impose reasonable time limitations. The court in *Natural Gas Pipeline Co. v. Federal Energy Regulatory Commission*, 590 F.2d 664 (7th Cir. 1979) did not disagree; it held only that the Commission could not impose a flat 30-day requirement under that Order.

[5]Advance payments made before January 1, 1981, under pre-existing agreements may be included in a pipeline's rate base through December 1990, but since the issue here involves front-end payments under the order governing agreements made in 1973, most of the payments affected by the decision below probably already have been made.

[6]Petitioner emphasizes (Pet. 3, 9, 13) the size of the advance payments involved. But the significant figure for this case is the revenue loss to petitioner if it is not permitted to include those payments in the rate base, and the increase in rates to consumers if it is permitted to do so. Those figures depend, of course, on the Commission's decision on remand concerning the extent to which the advances may be included in the rate base. For example, if none of the disputed advances is included, petitioner would lose about

precedential nor a practical effect significant enough to merit this Court's review.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1980

$21 million in revenues for the rate period at issue in the undulying proceeding, and each affected consumer would save about $2.57 for that period. If the Court declines to review these cases, those figures reflect the maximum disparity in treatment resulting from the two decisions.

[7]Petitioner attempts to "reserve[ ] the right to [raise other objections to the decision below]" if certiorari is granted (Pet. 11 n. 12). This attempt overlooks the provision of Rule 23(1)(c) of the Rules of this Court, which provides that "[o]nly the questions set forth in the petition or fairly comprised therein will be considered by the court." See also Rule 40(d)(2).

DOJ-1980-02